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In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents/co-guardians, LESTER L. and JOYCE CRUZAN,
Petitioners,

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,

vs.

THAD C. McCANSE, Guardian ad litem,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF OF THE DISTRICT ATTORNEY OF MILWAUKEE COUNTY, WISCONSIN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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ISSUE PRESENTED

Does the Constitution require states to authorize a court-appointed guardian to cause the death of a dependent ward, by withholding food and water, where the ward is not terminally ill and left no clear and convincing evidence of her intent?

Interest of Amicus Curiae[1]

Your amicus has held the office of District Attorney of Milwaukee County for twenty-one years. District attorneys in the State of Wisconsin must "[p]rosecute or defend all actions . . . in which the state or county is interested or a party." Section 59.47(1), Wis. Stats. As a corollary, district attorneys must investigate reports of criminal wrongdoing, including accusations of homicide or neglect that arise from the withholding of medical treatment and/or food and water. Several such reports have been received by the Milwaukee County District Attorney's Office in recent years.

Also under Wisconsin law, "all deaths in which there are unexplained, unusual or suspicious circumstances" must be reported to the medical examiner, who then must

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[1] Consent to file this brief was obtained from Attys William Colby, Robert Presson, and Thad McCanse on behalf of the parties.

notify the district attorney. Section 979.01(1)(a), Wis. Stats. Finally, Wisconsin law requires that physicians list contributing causes of death as well as the primary cause of death on all death certificates. Section 69.38(4), Wis. Stats. Deaths caused or contributed to by dehydration, malnutrition, or starvation are sufficiently "unusual" in Milwaukee County to merit reporting under this statute.

Although this brief is submitted in his official capacity as District Attorney of Milwaukee County, the author does not claim to speak for or represent the views of Milwaukee County or the State of Wisconsin on the issues discussed herein. Rather, the intent and purpose of this brief is to raise for the Court's consideration certain public policy issues, related to criminal law, from the perspective of a public prosecutor.

Summary of Argument

The Petitioners' position would require that the Court take three steps, each of which is necessary to reverse the Missouri Supreme Court's decision:

1. Broaden a claimed right to privacy to encompass the common law right to refuse medical treatment, thereby precluding states from setting their own standards and procedural safeguards.

2. Define this claimed right so broadly as to include the right to refuse even food and water.

3. Hold that states must allow guardians and families to withhold food and water to cause the death of incompetent patients -- even in the absence of reliable evidence of the patient's own wishes.

Grave public policy problems are raised by each of these steps. This brief will not address the constitutional debate over expansion of the penumbral right to privacy. Rather it will focus on public policy concerns, from a public prosecutor's perspective, of equating the provision of food and water with medical treatment, and of giving guardians

absolute, unsupervised life-and-death power over incompetent wards.

Discovery by this Court of a fundamental right on the part of families to cause the death of an incompetent member through the withholding of food and water -- especially if such a right can be exercised without court approval or supervision -- would put public prosecutors charged with enforcing laws against elder abuse, assisted suicide, and homicide in a most difficult position. Unquestionably, lethal abuses would occur. Petitioners' position in this case is problematic, from a prosecutorial perspective, on several grounds.

The Petitioners in their brief disregard the critical difference between (1) the well-settled common law right to refuse burdensome medical treatment, and (2) the refusal or rejection of life itself. In truth, there is nothing at all objectionable about the medical treatment and care that Nancy Beth Cruzan is

receiving.[2] Rather, it is Nancy's "vegetative existence" that the Petitioners find objectionable. The demand for a "right to reject [Nancy's] vegetative existence" (Pet. Brief at 15), amounts to a demand that this Court constitutionally mandate Missouri's approval of passive euthanasia.

The argument that families should be given unsupervised life-and-death authority over incompetent members must be carefully scrutinized in our present social climate. In recent years, we have come to understand that the frail elderly are often the victims of domestic abuse. Many states have responded to reports of widespread abuse and neglect of the elderly by enacting "elder abuse" statutes. These laws are carefully crafted to protect frail elderly and

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2 In fact, the excellence of the medical care provided by the Missouri State Rehabilitation Center has convinced the Petitioners not to transfer Nancy to a nursing home (TR. 352).

disabled persons from, primarily, <u>family members</u>.[3] The inherent vulnerability of elderly and disabled citizens creates a compelling need for strict judicial oversight of decisions, made by proxy, to withhold basic care. The Missouri Supreme Court in this case, and the New York Court of Appeals in <u>In re O'Conner</u>, 534 N.Y.S.2d 886 (1988), recognizing this need, have adopted reasonable and necessary procedural safeguards to protect against abuse.

To permit passive euthanasia of <u>any</u> patients would be to establish dangerous and unavoidable policy precedents. Judicial identification of a limited class of incompetent patients who need not be fed will inevitably increase public pressure for a mechanism of death which is

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3 A study sponsored by the Family Research Laboratory of the University of New Hampshire, and reported by UPI on January 23, 1986, found a self-reported abuse rate of 32 per 1000. Extrapolated, this rate would yield over 700,000 senior citizens who are abused by family members. 58% of the abusers were spouses; 24% were children.

faster, more "humane," and less stressful to families than dehydration or starvation. Active euthanasia by lethal injection will soon follow, whether or not it too becomes an officially recognized right. Moreover, if starvation becomes a fundamental "right" for the permanently unconscious, there will follow great pressure by families and physicians to expand it --for the "benefit" of conscious patients with severe disabilities such as Alzheimer's disease, dementia, mental retardation, and mental illness.

ARGUMENT

I. PETITIONERS OVERLOOK CRITICAL DIFFERENCES BETWEEN REFUSING MEDICAL TREATMENT VERSUS REFUSING UNACCEPTABLY DISABLED LIFE.

Petitioners urge that the Court decide "[w]hether a state's general interest in life can override all constitutional privacy, liberty and equal protection rights of an incompetent person to reject medical treatment." (Pet. Brief at I.) The outcome of this case will depend

heavily on whether the Court accepts two key assertions of the Petitioners. The first characterizes tube feeding as "artificial" medical treatment, the withdrawal of which is to be analyzed just like any other medical treatment. The second characterizes incompetent patients as neither needing nor desiring more protection than competent patients.[4]

These characterizations, however, are not consistent with our experience in the criminal law arena. Neither are they consistent with Wisconsin practice and Wisconsin law. Wisconsin's Natural Death Act (Chapter 154, Wis. Stats.), establishes the framework for executing advance medical directives, or "living wills." Chapter 154 explicitly excludes "fluid maintenance and nutritional support" from the statutory definition of "life-sustaining procedure" (which can be

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[4] The consequences of treating a third-party request for passive euthanasia just as if it were a competent refusal of treatment will be discussed in Section II.

withheld or withdrawn under the act). Section 154.01(5)(b), Wis. Stats. In two successive sessions of its legislature, Wisconsin has refused to expand its Natural Death Act to encompass the refusal, by competent patients, of nutrition and hydration.

Wisconsin has also rejected the "substituted judgment" doctrine in favor of the more objective "best interests" test, thereby affording greater protection to the state's incompetent citizens. In In Re Guardianship of Pescinski, 67 Wis. 2d 4 (1975), the Wisconsin Supreme Court held that neither a guardian nor a court could consent, on behalf of an incompetent ward, to the donation of a kidney to the ward's dying sister. In rejecting the concept of "substituted judgment," the court held that "An incompetent particularly should have his own interests protected. Certainly no advantage should be taken of him." Id. at 8. In In Matter of Guardianship of Eberhardy,

102 Wis. 2d 539 (1981), the same court held that a guardian could not authorize sterilization. Finally, in March of this year a working group of Wisconsin probate judges, organized by the Wisconsin Supreme Court, adopted and recommended standards, based on two model standards, which require the appointing court's approval before a guardian can refuse life-sustaining medical treatment or care for an incompetent ward.[5]

A. Petitioners Do Not Propose to Refuse "Medical Treatment" On Nancy's Behalf, but to Withhold Only Food and Water -- Leaving the Feeding Tube in Place.

It is not surprising that Petitioners frame the right they wish to constitutionalize -- the right to die -- as the well-established common law "right to refuse unwanted medical treatment." (Pet. Brief 12.) Petitioners label the nutrition Nancy receives as "artificial;"

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[5] See "Michigan Standards," proposed by the Center for Social Gerontology, Inc., p. 29-30; 37, requiring prior court authorization for the removal of life support from ward.

this tends to make the food and fluids that Nancy receives appear more technological, and therefore less desirable. (Pet. Brief i, 9, 12, etc.) Throughout their briefs, Petitioners and their supporting amici equate Nancy's feeding tube with "medical treatment," and imply that there is something objectionable about this "treatment" that Nancy should be allowed to refuse. (Pet. Brief at 16.)

In right-to-refuse-treatment cases, analysis has traditionally turned on the right of the patient to refuse the treatment, because of an objection to the treatment itself, such as its invasiveness, side effects, or religious unacceptability. No such objection to the feeding tube has been offered in this case, nor could it be. Logically and practically, there are only two things about tube feeding that can be "artificial" or objectionable: the food which is poured down the tube, or the tube

itself.

Most tube-fed patients receive a highly processed solution which indeed is "artificial." Yet the label of "artificial" in this sense applies to a great many modern, processed foods now commonly consumed by healthy people. Moreover, there is no reason why Nancy could not receive liquid nutrients guaranteed to be "100% Natural" -- if that were really the objection to the feedings.

The other element in Nancy's care that could be considered "artificial" or objectionable is the tube itself. The trial testimony of Petitioners' expert witness, Dr. Ronald Cranford, makes it apparent, however, that Petitioners do not intend to remove Nancy's feeding tube. Rather, the plan is to leave the tube in place, and to continue tc use it -- for partial hydration and medication (TR. 490; 437-42). (See also the trial testimony of Mrs. Paul Brophy, TR. at 467-68.) It cannot, therefore, be the feeding tube to

which the Petitioners object. If they prevail, Nancy will die for lack of food and water -- but with her tube still in place.

B. The "Right to Reject Vegetative Existence" that Petitioners Demand Would Constitutionally Mandate Missouri's Approval of Passive Euthanasia.

The favored rhetorical phrase -- "rejecting medical treatment" -- collapses under the analysis in Part A. But the critical question remains: **what really is being rejected?** A medical treatment or life itself? Petitioners answer this question by asserting that "permanent, completely vegetative existence . . . is an unfortunate condition that we all have a fundamental liberty right to reject." [Pet. Brief at 15 (emphasis added)]. In reply the Missouri Supreme Court recognized that "this is not a case in which we are asked to let someone die... . This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration."

Cruzan v. Harmon, 760 S.W.2d 408, 412 (Mo. 1988). Petitioners and their amici aim to establish, and constitutionalize, a positive "right to die," to be exercised by a third person, on unarticulated premises, with no court review or any other hint of procedural due process.

The argument that the feeding tube is "artificial" functions as a rhetorical device, used to distance the care that is being provided from "feeding." After all, feeding the hungry and the helpless is a powerful symbol of caring, and is considered a duty by our society.[6] But when, despite the rhetoric, the object is to end an unacceptably disabled life, the extent to which the life-sustaining care denied is "artificial" is quite irrelevant. Even the least artificial means of feeding becomes objectionable.

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[6] This duty has been aptly described as "the perfect symbol of the fact that human life is inescapably social and communal." Callahan, D., "On Feeding the Dying," Hastings Ctr. Rpt., 13(5):22, October 1983.

No one, at any level of functioning, can survive without food and water. There is good reason, therefore, to establish a special, more protective standard for withholding food and water. The point that provision of nourishment is basic care necessary to sustain all life was made forcefully and eloquently by a dissenting justice of the Washington Supreme Court:

> As infants, we were given food and drink when we were too helpless to nourish ourselves. And for many of us, as with the patient in this case, a day will come before we die when we are once again too helpless to feed ourselves. All living beings need food and water in order to live, but such nourishment does not itself heal or cure disease. When we stop feeding the permanently unconscious patient, we are not withdrawing from the battle against any illness or disease; we are withholding the nourishment that sustains all life.

In Re Grant, 747 P.2d 445 (Wash. banc 1987); modified at 757 P.2d 534 (1988), Andersen, J. (concurring in part, dissenting in part.; note, however, that this dissent is now apparently the opinion of the court, as the result of a change of

vote by one of the justices in the original majority).

It is often argued that a feeding tube provides nourishment to the patient who cannot swallow just as a respirator provides air to the patient who cannot breathe. It is true that a feeding tube is, in this sense, the functional equivalent of a respirator.

Still, there are important distinctions relevant to a proper analysis of withholding care. If a respirator is turned off, many patients will attempt to breathe on their own, and some will be able to do so. Such was the case with Karen Quinlan, who lived, with a feeding tube, for nine years after her respirator was removed.

Conversely, when a feeding tube is removed,[7] the patient is unlikely to attempt to obtain nourishment on her own, and in most cases the caregivers will make no attempt to offer food and water by mouth. In the absence of all efforts to

feed, the outcome of death is guaranteed. Cessation of feeding, then, is not a "treatment option," but a reliable means of causing death. Finally, and as a matter of public policy, the Court should not discount the symbolic nature of nourishment -- however it might be provided. While respirators may have come to symbolize cold, invasive technology, nourishment -- even by tube -- remains, to many, symbolic of societal caring for its least fortunate members.

The Court should not assume, for life-and-death purposes, that a bold line exists between patients who can swallow versus those who cannot. For example, an elderly patient with a progressive dementia (such as Alzheimer's disease), will, over time, need more and more assistance (human and technological) with

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[7] If it is in fact removed. Oftentimes, as is intended here, the tube is left in place for easy administration of medication, and feeding is discontinued.

eating. This assistance can be divided conceptually into at least five levels:

1. Assistance in eating regular solid foods.
2. Spoon feeding with pureed foods.
3. Feeding liquid nutrients by cup or straw.
4. Feeding liquid nutrients by syringe.
5. Nasogastric tube (via nasal passage); or gastrostomy tube (surgically implanted).

Given this progression of assistance in feeding, and the clear legal duty (in general) to feed disabled patients, where does a public prosecutor draw the line between the rejection of treatment versus the rejection of life? This issue is further complicated by the fact that many feeding tubes are inserted not because the patient has completely lost the ability to swallow, but rather because a busy nursing home staff can't spend enough time feeding by mouth to provide sufficient nutrition.

Petitioners' expert witness, Dr. Ronald Cranford, testified at trial that feeding Nancy by syringe or spoon would constitute "medical treatment," as would spoon feedings of any permanently unconscious patient (TR. 163-66). So it

really doesn't matter, under this expert's analysis, whether Nancy could take her food and water by mouth: spoon feeding, as "medical treatment," could also be freely withheld by Nancy's family. Clearly, then, passive euthanasia, and not the rejection of treatment, is the "liberty" sought by Petitioners.

II. THERE IS A COMPELLING NEED FOR STRICT JUDICIAL OVERSIGHT OF DECISIONS TO WITHHOLD FOOD AND WATER FROM ELDERLY AND INCOMPETENT PATIENTS.

Pervasive throughout the arguments of Petitioners and their amici is the claim that the Missouri Supreme Court's decision, by its "intrusion" into life-and-death decision-making for incompetents, is antithetical to "good patient care." See, for example, the amicus Brief For Wisconsin Bioethicists at 1-2. But the decision below clearly left substantial latitude for families' and guardians' participation in medical decision-making. It is simply not true that "the majority completely removed

Nancy Cruzan's family from her medical treatment decisions." (Pet. Brief at 14.)

The court did not terminate Petitioners' guardianship over Nancy. The court did not hold that Nancy must receive a transplant if her heart should fail, CPR and a respirator if she should stop breathing, or even antibiotics if she should develop an infection. What the court did hold was that Nancy must be fed: that her court-appointed guardian is not authorized to bring about her death by withholding food and water. The court placed a reasonable -- and necessary -- limitation upon this right of medical decision-making: families may not cause the death of a dependent ward by withholding food and water in the absence of clear and convincing evidence that the ward did refuse the feeding tube while competent.

A. The Court Must Balance Any Privacy Right to Refuse Treatment Against the Countervailing Right to Life of the Incompetent Patient.

Assuming, arguendo, that a "fundamental liberty/privacy right" can be found in the penumbra of our Constitution, this right must still be balanced against the disabled patient's countervailing, and explicitly guaranteed, right to life. Given the need for a careful balancing of these rights, the Missouri court's presumption in favor of providing feeding via tubes, and its requirement of clear and convincing evidence to the contrary for this presumption to be overcome, strikes a reasonable and appropriate balance, from a prosecutorial viewpoint.

Neither can the Missouri court's decision be considered an aberration. The New York Court of Appeals has also upheld incompetent patients' right to receive food and water via feeding tube: that is, unless those who would withdraw nourishment offer clear and convincing evidence of a well-settled, specific refusal while competent. In re O'Conner, 534 N.Y.S.2d 886 (1988).

The following case, which was reviewed by the Milwaukee County District Attorney's Office, shows that avoiding judicial review does not always maximize "good patient care."

> The patient was a 90 year-old woman whose medical problems included stroke and arteriosclerosis. She was conscious but incompetent and mostly unresponsive at the time she was admitted to the nursing home. She was neither comatose nor terminally ill, and received food and water via naso-gastric tube. Upon admission, the patient's daughter signed a form requesting only palliative care. Eleven weeks after admission, the attending physician entered a "No Code 4" order on the patient's chart. The patient's family often asked the home's nursing staff: "When will she die?"
>
> Two weeks after the no-code order was entered, the daughter filed a petition for guardianship, pursuant to Chapter 880, Wis. Stats. A guardian ad litem was appointed for the patient by the probate court. One week later, the patient's nasogastric feeding tube became occluded. The daughter, who was present at the time, demanded that the feeding tube not be replaced. The home physician allowed the tube to remain out overnight, pending an ethics committee meeting with the family.
>
> At this meeting, the nursing staff expressed concern that the feeding tube, which had been in place for months, first become objectionable to the daughter when her mother's medicare coverage expired. Regardless

these concerns, the home's ethics committee unanimously approved the discontinuation of the feeding tube. The patient's guardian ad litem did not attend this meeting; neither he nor the probate court was advised of this decision.

The patient died after seven days without food or fluids. On the day before the patient died, the daughter's lawyer appeared in probate court to advise that "the ward has become quite ill and it is questionable whether or not there will be a need for a guardian." The action was then dismissed at the daughter's request. The patient's physician did not list dehydration as either the immediate cause of death, or as a contributing factor, on the patient's death certificate. Instead, the cause and contributing factors listed were "heart failure," "massive stroke," and "arteriosclerosis."

Perhaps no appellate court has gone further to avoid judicial review of just this type of c se than the California Court of Appeals in In re Drabick, 245 Cal. Rptr. 840 (Cal. App. 1988). The Drabick court was so determined to discourage judicial supervision of life-and-death decisions made for incompetent patients that it restates that proposition in various terms no fewer than 25 times in the first half of its opinion. Yet even

the Drabick court, which so clearly wished to avoid the "forced continuance of that biological vegetative existence" Id. at 15 (slip opinion), refused to adopt the doctrine of "substituted judgment" to achieve this end. It found

> no authority -- other than cases on the subject of life-sustaining treatment -- to support the idea that a person can exercise (or waive) a fundamental constitutional and common law right unintentionally through informal statements years in advance. It would be a dangerously unpredictable precedent.

Drabick, Id. at 40 (slip opinion).

B. Requiring Clear and Convincing Evidence of an Incompetent Patient's Intent to Refuse Food and Water -- As Missouri and New York Have Done -- Is Necessary To Adequately Protect Vulnerable Citizens From Decisions that Are Not In Their Best Interests

One amicus brief asserts that, in decision to withhold or discontinue food and water, "[guardians] may not be constitutionally restricted, any more than the patient herself could be restricted, if competent." Brief For Wisconsin Bioethicists at 4. Were this principle

sound, and applied to other legal practices in this state, many long-established rules of law would be suspect.

The rule of law urged by the Petitioners, will have broad and deleterious application if adopted by the United States Supreme Court. The Court should not be mislead by the antiseptic circumstances and apparently benign concern of the parents in this case. To accept sanguine presumptions of familial concern for comatose or vegetative relatives would be to ignore the startlingly high incidence of intra-family violence cases -- including homicide -- found in the nation's criminal courts.

Spousal battery and child abuse cases are legion, and studies suggest that abuse of the elderly by family members is far more pervasive than usually thought. Domestic violence has become an every day feature in the lives of millions of Americans. The Report of Attorney General's Task Force on Family Violence

(U.S. Dept. of Justice, 1984) reported this trend at pages 10 and 11:

> Although comprehensive and uniform statistics are not available, estimates from Task Force testimony indicate that family violence is a crime problem of shocking magnitude. Battery is a major cause of injury to women in America. Nearly a third of female homicide victims are killed by their husbands or boyfriends. Almost 20 percent of all murders involve family relationships. Ascertainable reported cases of child abuse and neglect have doubled from 1976 to 1981. In addition to the one million reported cases of child maltreatment, there may be yet another million unreported cases. Untold numbers of children are victims of sexual abuse, and uncounted older person suffer abuse. (Citations omitted.)

It is a mistake to imagine that such a marked increase in "crimes of passion" has not been accompanied by a similar increase in calculated criminality within families. Examples of the latter are also depressingly common in our criminal courts. Looting the homes of incompetent parents, theft from jointly held bank accounts, fraud and defalcation are all too common, and no doubt underreported, crimes. In circumstances involving care

of the elderly by an adult son or daughter, an avaricious desire to expedite an inheritance not uncommonly may physically endanger the elderly parent. These darker realities of intra-family crime justify Missouri's protective policy adopted in this case.

Wisconsin state law in the probate area is also protective of the incompetent ward. In this state, as in most others, guardians clearly remain under the appointing court's supervisory authority. Wisconsin law provides that guardians "shall endeavor to secure necessary care." Section 880.38(2), Wis. Stats. Guardians cannot consent to their ward's placement in a nursing home. Section 880.38(1), Wis. Stats. Furthermore, they must file with the court an inventory of financial transactions ma^e on the ward's behalf (Section 880.18, Wis. Stats.), and may not sell a ward's real estate without prior court approval. Section 786.07, Wis. Stats. These rules are not uncommon among

the states, and all exist to protect vulnerable wards from decisions which might not be in their best interests.

The standard of proof applied to a particular proceeding should reflect society's judgment concerning how the risk of error should be distributed among litigants. Santosky v. Kramer, 455 U.S. 745, 755 (1982). The clear and convincing standard "forbids relief whenever the evidence is loose, equivocal or contradictory." Matter of Storar, 52 N.Y.2d363, 379 (1981). If ever the higher standard of proof is justified, it is when the life of a vulnerable citizen hangs in the balance.

A finding that Nancy, while competent, specifically refused feeding tubes would amount to a finding of waiver of a right explicitly protected by the Constitution--her right to life. Whenever a court is asked to make such a finding, the clear and convincing standard of proof is appropriate and necessary. As discussed above, however, one needs contemporaneous

refusal in most other matters considered by our society to be of critical importance (such as consent to marry, waiver of trial, etc.). Other matters require strict and formal written declarations of intent (as a will). By this comparison, the question is starkly presented: must we not provide the same procedural due process for incompetent patients at risk of being wrongly denied food and water, as we offer to those same persons in other contexts?

The criminal law zealously guards the rights of the incompetent. In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the Court held a waiver to be "an intentional relinquishment or abandonment of a known right or privilege." In Pate v. Robinson, 383 U.S. 375, 384 (1966), and Drope v. Missouri, 420 U.S. 162, 171 (1975), the Court held that an incompetent person cannot waive his right to counsel and cannot be put to a criminal trial in such a condition. No attorney or guardian

could waive such constitutional rights for or on behalf of an incompetent person.

C. Allowing Families to Cause Death by Withholding Basic Care Would Cause Grave Problems for Public Prosecutors Charged with Enforcing laws Against Elder Abuse, Assisted Suicide, and Homicide.

Reliance on the doctrine of substituted judgment by a family member to resolve this case and others like it is intellectually suspect and practically unworkable. Today's society has found it necessary to enact "elder abuse" statutes to protect frail and vulnerable citizens from their neighbors and--especially--from their families. As part of its efforts to protect its elderly and disabled citizens, Wisconsin has enacted its own elder abuse statute:[8]

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[8] Minnesota also has an elder abuse statute, "Maltreatment of Vulnerable Adults," which mandates reporting of "neglect," including "failure by a caretaker to supply a vulnerable adult with necessary food. . . Section 626.557(2)(E), Minn. Stats. Section 626.557(11a) requires prosecutors to immediately investigate and prosecute offenders.

> **940.285(1) Abuse of vulnerable adults.** "Vulnerable adult" includes "developmentally disabled," "infirmities of aging," "mental illness or other like incapacities." Sub (2) prohibits "Cruel maltreatment," which includes . . . (c) "Cruel deprivation of a basic need for food, shelter, clothing or personal or health care..."

Wisconsin's elder abuse law contains no language exempting permanently unconscious persons from its protective scope. Therefore, if a patient like Nancy were living at home, and her parents -- or others -- unilaterally decided to withhold food from her, they would seem to have committed the crime defined under Section 940.285, Wis. Stats. The nature of the conveyance by which food is administered does not magically change the food provided from basic care to something else; in fact, tube-conveyed food is quite often easier for the caretaker.[9]

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[9] It would seem odd to argue that a caretaker has a legal duty to feed by spoon -- a painstaking task taking hours each day -- but that the legal duty dissolves upon insertion of a feeding tube, which greatly reduces the time and effort required to provide adequate nourishment.

III. REQUIRING THE STATES TO AUTHORIZE PASSIVE EUTHANASIA OF PERMANENTLY UNCONSCIOUS PATIENTS IS NOT NECESSARY TO PROTECT SUCH PATIENTS' LEGITIMATE LIBERTY INTERESTS, AND WOULD NEEDLESSLY INVITE DANGEROUS ABUSES.

The prevalence of alcohol and illegal drug abuse has precipitated an avalanche of child abuse and neglect cases that currently overwhelms most local agencies. It is not unreasonable to question whether such dysfunctional families should be trusted as proxy life-and-death decision makers. Even if they knew their incompetent members' wishes, they would be unlikely to honor them. They would be even less likely to draw fine distinctions between permanently unconscious family members and those who are otherwise unacceptably disabled.

Such families are unlikely, of course, to have their cases reach appellate courts and be reported. Nonetheless, incompetent members of dysfunctional families would be at the mercy of a policy of judicial laissez-faire. Recognizing this, the

Missouri Supreme Court noted, "[W]e must remember that we decide this case not only for Nancy, but for many, many others who may not be surrounded by the loving family with which she is blessed." Cruzan, supra at 412.

A. A Fundamental "Right" For Permanently Unconscious Patients To Have Food and Water Withheld Will Quickly Be Expanded for the "Benefit" of Conscious Patients With Disabilities Such as Alzheimer's Disease, Dementia, Mental Retardation, and Mental Illness.

Certainly the "vegetative existence" criterium that Petitioners use to describe Nancy's condition provides no logical limits upon which prosecutors can draw legitimate distinctions. The case for Nancy's "right" to reject her existence applies with equal force to other, less disabled patients. The patient's prior statements about wanting to avoid dependency would be no less relevant and controlling if the patient were conscious, but unable to communicate or swallow. No less compelling would be the case of the

ambulatory patient, paranoid of all around her, who does little but wander around the nursing home, groaning and banging her head against the wall. What of her right to reject that dependent existence? Petitioners' argument is dangerous precisely because the force of its logic may be -- and will be -- applied to other disabled patients whose care and feeding pose a long-term burden and expense to themselves and others.

If both unconscious and Alzheimer's patients retain their privacy rights after losing competency, then both would seem to be "entitled," by principles of equal protection, to cessation of tube feeding. By what reasoning can a prosecutor distinguish them? If anything, the conscious patient who suffers greatly has a stronger "fundamental liberty right" to reject his existence full of suffering (than does Nancy to reject her vegetative existence).

The Petitioners' own medical expert, Dr. Cranford, recognized the force of this logic. By defining the spoon feeding of conscious patients as "medical treatment," he would afford families the right to withhold food and water from "other severely neurologically devastated patients who have markedly impaired consciousness who may have a swallowing reflex and may not be able to swallow very normally, such as patients who are severely and profoundly demented" (TR. 167; emphasis added). Thus, Dr. Cranford would allow families to withhold nourishment even from conscious patients who can swallow.

Adoption of such logic puts the lives of very vulnerable disabled citizens in grave danger. Such a development will impact upon prosecutions for so-called "mercy killings." Prosecutions of "mercy killers," difficult enough now, will become even more difficult under such circumstances. How unfair it will seem to

criticize the mercy killer who "humanely dispatches" a patient that will die in a week or two of dehydration anyway. Can juries be expected to convict (of elder abuse or homicide) a family member who withholds food and water from an Alzheimer's patient if the practice has been judicially approved and become socially acceptable for unconscious patients? Judicial tolerance for families choosing death by the withholding of nourishment entails an erosion of protection for all disabled patients from both passive and active euthanasia.

Finally, the application of the "right to privacy," of all possible rights, to Nancy and other incompetent patients has little basis in reality. Such phraseology invokes the image of Grandma, living out her last days in the privacy of her home, in quiet dignity, surrounded by her loving family. And in fact, there is a large group of people (many elderly) who choose not to avail

themselves of any part of the health care system. But this scenario is the exception to the rule. Nancy, and many other severely disabled patients, are cared for in public facilities, supported by public funds, and supervised by public courts, via court-appointed guardians. It should not be surprising, then, that deaths caused by withholding food and water are sometimes reported to prosecutors by dissenting family members or health care professionals. The assertion that a life-or-death decision, under these circumstances, is "private" and therefore beyond state supervision and immune from judicial review, is as baseless as it is dangerous.

CONCLUSION

The Supreme Court of Missou i has established, with its decision in this case, minimal and necessary procedural safeguards. We must not pretend that every

family and every guardian is always motivated only by the the patient's best interests. The Missouri Supreme Court has not suspended the Bill of Rights. Rather, it has required that, before anyone can choose death by dehydration for another, he must clearly show that the choice was made by the patient while competent (or, perhaps, that the feeding tube causes intractable pain). This is a reasoned and reasonable judgment which should be affirmed -- not to vindicate any abstract rights of the State of Missouri, but to protect the most threatened among us.

Respectfully submitted,

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